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No. 04-1514

In the Supreme Court of the United States

WH-T.V. BROADCASTING CORPORATION,
Petitioner,

v.

ZENITH ELECTRONICS CORPORATION; MOTOROLA, INC.; and GENERAL INSTRUMENT CORPORATION,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENT ZENITH'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Was the Court of Appeals correct in holding that the district court acted within its discretion in excluding the testimony of plaintiff's damages expert?

STATEMENT IN COMPLIANCE WITH RULE 29.6

LG Electronics, U.S.A., Inc. is the parent corporation of Zenith Electronics Corporation, and owns 10% or more of its stock.

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STATEMENT OF THE CASE

Zenith Electronics Corporation ("Zenith"), plaintiff below and respondent here, supplied set-top boxes to petitioner WHTV, a television broadcaster in Puerto Rico, in connection with WHTV's planned conversion from analog to digital television service. By being the first to offer digital service in Puerto Rico, WHTV hoped to enroll many more subscribers than it had in the past. WHTV's expectations were disappointed, however, when DirecTV, a new satellite competitor, beat WHTV to the market. WHTV's failure to launch its digital service prior to DirecTV's entry in the market was unrelated to the alleged problems with Zenith's set-top box.

Notwithstanding the alleged problems with Zenith's set-top box, WHTV succeeded in converting its analog subscriber base to its new digital service. There was evidence that many of the alleged problems with Zenith's set-top boxes originated in other parts of WHTV's system, and the box was the convenient scapegoat. There was also evidence that none of the alleged problems were of the magnitude that would have prevented WHTV from competing against DirecTV, if it were able. WHTV continued to purchase Zenith's set-top boxes even after modifications were made to WHTV's system that were intended to allow WHTV to purchase set-top boxes from other manufacturers. (WHTV argued that the modifications were not successfully completed, but there was evidence to the contrary. WHTV was also sanctioned on account of its failure to timely disclose its purchases after the completion of such modifications.) Although WHTV kept and used Zenith's set-top boxes, it refused to pay for the final shipment.

Zenith brought suit to recover unpaid balances due on the set-top boxes. WHTV counterclaimed for loss of profits allegedly suffered by reason of alleged defects in the set-top boxes. The profits that WHTV supposedly lost were from future subscribers that it had not yet enrolled. Its projections of future subscribers were not based on WHTV's past experience, since WHTV's enrollment peaked in 1998, and declined by nearly 1,000 subscribers during the last half of 1998, long before the start of its digital service. WHTV did not offer any evidence of damages resulting from a single customer who either terminated or declined service on account of the alleged problems with Zenith's set-top box.

In support of its damages claim, WHTV relied solely on the testimony of its retained expert, Peter Shapiro. App. 3a-4a. To arrive at his lost-profits numbers, Shapiro projected the future growth of DirectTV, and then projected the share of Direct TV's subscriber base that he estimated WHTV could have enrolled had it not been purportedly delayed by the alleged deficiencies in the set-top boxes. App. 4a–5a. In making such estimates Shapiro did not compile data from other markets regarding the growth rate of direct broadcast satellite providers, and he did not rely on the experience of MMDS broadcasters in other markets. App. 4a, 23a-24a and 25a-26a. He simply pointed to a number of "factors" that he considered would influence WHTV's share of the market, assigned arbitrary percentages to each factor, and arrived at precise numbers for WHTV's "market share" for each future year through 2008. App. 24a-26a. On cross-examination Shapiro repeatedly insisted that the sole basis for the numbers he offered was his "judgment," his "experience," or "his curriculum vitae." App. 5a and 26a.

Shapiro did not, as WHTV asserts, base any part of this projection on historical growth rates of direct broadcast satellite providers in the United States and he was barred by the district court from attempting to supplement his opinion with such information, which he tried to do long after the close of discovery. App. 32a, fn. 1. Moreover, Shapiro did not, as WHTV again erroneously asserts, examine six years of data from the Mexican market in arriving at his estimates. Shapiro only looked at data from 2002, not as part of his methodology but only, in his words, as a "cross-check." App. 25a – 26a. As the court of appeals noted, Shapiro "eyeballed but did not analyze" the Mexican data. App. 5a. In any event, Shapiro's 2002 snapshot was meaningless, and no reliable inferences could be drawn therefrom, as the district court concluded. App. 26a.

Shapiro never denied the existence of other markets using the same MMDS technology and industry-standard equipment, as WHTV now asserts for first time after the court of appeal's ruling and in its petition to this Court. See Pet. at 12. When questioned on this topic, Shapiro claimed that such other markets were "irrelevant" since Puerto Rico presented unique market circumstances. App. 5a and 33a-34a.

Shapiro also opined that WHTV's business opportunity was permanently lost, a contention that was disputed by Zenith's experts. To illustrate Shapiro's inflated damage estimate, one of Zenith's experts calculated what WHTV's damages would be if it were found that WHTV's opportunity was only delayed. Using Shapiro's own forecasts and assumptions, Zenith's expert demonstrated that at most WHTV's damages would be a fraction of what was claimed. Far from "accepting" Shapiro's methodologies, as WHTV contends, Zenith's expert used his "method" against him.

The district court, in two successive opinions, concluded that Shapiro's opinion was not reliable within the requirements of Rule 702 of the Federal Rules of Evidence and excluded the proffered testimony. App. 26a – 27a; App. 35a. The court also excluded, on procedural grounds, lay testimony that WHTV belatedly sought to introduce in support of its damages claim. App. 15a – 18a. There being no evidence to support WHTV's damages claim, but having found a breach on Zenith's part because of a failure of the set-top boxes to conform to the contract, the court granted summary judgment for nominal damages on WHTV's counterclaim. WHTV appealed, urging error in the exclusion of the damages evidence. The court of appeals affirmed.

(WHTV had joined as third party counter-defendants Motorola, Inc. and its subsidiary, General Instrument Corporation, successors to Zenith's division that made the set-top boxes. The district court's judgment in favor of Zenith eliminated WHTV's claims against those entities, which are additional respondents in this Court. Motorola and General Instrument have filed a waiver indicating that they do not intend to file a separate brief in opposition to the petition for certiorari.)

REASONS FOR DENYING THE WRIT

A. THE CASE PRESENTS ONLY AN ISSUE OF THE DISTRICT COURT'S DISCRETION IN EXCLUDING EVIDENCE. THAT COURT'S RULING, AND THE COURT OF APPEALS' AFFIRMANCE, WERE CONSISTENT WITH FED.R.EVID. 702 AND THIS COURT'S DECISIONS CONCERNING THE ADMISSIBILITY OF EXPERT TESTIMONY, AND CREATE NO CONFLICT WITH DECISIONS IN OTHER CIRCUITS.

The case does not present the questions posed by petitioner. The court of appeals did not "require" that an expert use any particular analytical method or "condition" the admissibility of expert testimony on the use of methods described in the *Reference Manual on Scientific Evidence*. It held only that review of a trial court's decision under Rule 702 of the Federal Rules of Evidence is deferential, and that the trial judge had not abused his discretion in excluding the proffered testimony of the plaintiff's damages expert. The court of appeals' discussion of regression analysis and the "tool kit of the social sciences" did not state or imply that the expert was required to use any particular method. The availability of recognized methods only made more glaring the inability or unwillingness of WHTV's expert to point to *any* method that he had used in arriving at his estimates of lost profits. As the court of appeals further emphasized, it was the proponent's burden to explain, if possible, why no recognized method could be used, and no such explanation was offered.

The petition for certiorari offers no reason for finding that the district court's ruling was an abuse of discretion. The

district court carefully considered, and reconsidered, and fully explained his reasons for concluding that Shapiro's opinions were not reliable. His conclusion was based squarely on this Court's guidance, as the following statement from the district court's opinion shows:

> As the Supreme Court has observed, "[t]rained experts commonly extrapolate from existing data. But nothing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert." *General Elec. Co. v. Joiner,* 522 U.S. 136, 146 (1997). Since Shapiro does not explain how he arrived at the percentages he presents in his opinion, the court concludes that "there is simply too great an analytical gap between the data and the opinion proffered." *See id.*

App. 26a-27a. The court of appeals repeated the same passage from this Court's *General Electric* decision, saying that it was a "fair description of Shapiro's proposed testimony." App. 8a.

The petition cites decisions from other circuits in which, petitioner contends, less exacting standards for admission of expert opinions were applied. Pet. 16-17. Without exception, however, the cases cited are ones in which a court of appeals upheld a district court's decision to admit the expert testimony in question. In view of the deference owed to a district court's ruling on the admissibility of evidence, none of the cited court of appeals' decisions conflicts with the decision in this case, and consequently those cases provide no basis for saying that other circuits observe more lenient standards in applying Rule 702 than did the court below. Thus, for

instance, petitioner's very first example is from the Fifth Circuit (see Pet. 16). Yet only days ago the Fifth Circuit upheld a district court's exclusion of an expert's lost profits testimony on grounds closely resembling those in this case. The Fifth Circuit said, "[E]xcluding McCoin's testimony was anything but an abuse of discretion. Indeed, McCoin made no effort to demonstrate the reasonable similarity of the plaintiffs' firms and the businesses whose earnings data he relied on as a benchmark." *El Aguila Food Products, Inc. v. Gruma Corp.*, 2005 WL 1156090, *2 (5th Cir. May 17, 2005).

It would be odd indeed to use this case, in which the district judge's ruling was so clearly within its discretion, as an occasion to retreat from the standards marked out by this Court's decisions in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), *General Electric Co. v. Joiner*, 552 U.S. 136 (1997), and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999), even if such a retreat were deemed desirable.

B. THIS COURT'S RULE 10 APPLIES.

The petition should be denied for the further reason that it raises nothing more than a question of the misapplication of a properly stated rule of law. The petition does not question that both the district court and the court of appeals correctly stated the rules of law applicable to the case.

CONCLUSION

The writ of certiorari should be denied.

Respectfully submitted,

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